

Before the
Federal Communications Commission
Washington, D.C. 20554

Nov 17 5 45 PM '05

In the Matter of)
)
SBC Communications Inc. and)
AT&T Corp. Applications for) WC Docket No. 05-65
Approval of Transfer of Control)
)

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 2005

Released: November 17, 2005

By the Commission: Chairman Martin and Commissioner Abernathy issuing separate statements;
Commissioners Copps and Adelstein concurring and issuing separate statements.

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I. INTRODUCTION

1. SBC Communications Inc. (SBC) and AT&T Corp. (AT&T) (collectively, "the Applicants") have filed a series of applications¹ pursuant to sections 214 and 310(d) of the Communications Act of 1934, as amended (Communications Act or Act)² and section 2 of the Cable Landing License Act³ in connection with their proposed merger. This merger would combine one of the largest regional Bell Operating Companies (BOCs) with one of the largest providers of interexchange and competitive local service. This proposed merger occurs against the backdrop of ongoing change in the industry, including the pending merger of Verizon and MCI and the recent merger of Sprint and Nextel.⁴ SBC and AT&T offer competing services in many communications markets, and each also supplies wholesale inputs

¹ *Commission Seeks Comment on Application For Consent to Transfer of Control Filed By SBC Communications Inc. and AT&T Corp.*, Public Notice, WC Docket No. 05-65, DA 05-656 (rel. Mar. 11, 2005), corrected by Erratum, WC Docket No. 05-65 (rel. Mar. 14, 2005) (*Public Notice*).

² 47 U.S.C. §§ 214, 310(d).

³ *Id.* § 35; see generally An Act Relating to the Landing and Operation of Submarine Cables in the United States, 47 U.S.C. §§ 34-39 (Cable Landing License Act).

⁴ This merger is one of three in little more than a year involving the former "Big 3" long distance carriers (AT&T, MCI, and Sprint), which faced rapidly declining revenues in some of their core retail markets in the past few years as a result of increasing competition from local carriers, wireless carriers, cable companies, and others. See *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, FCC 05-184 (rel. Nov. 17, 2005); *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-63, File Nos. 0002031766, et al., Memorandum Opinion and Order, FCC 05-148 (rel. Aug. 8, 2005) (*Sprint/Nextel Order*).

relied upon by the other Applicant and other competitors in various retail markets. Thus, the proposed merger requires us to examine its effects on competition – which are both horizontal and vertical in nature – in a wide range of significant communications markets.

2. In accordance with the terms of sections 214(a) and 310(d), we must determine whether the Applicants have demonstrated that the proposed transfers would serve the public interest, convenience, and necessity.⁵ Based on the record before us, and as discussed more fully below, we find that the transaction meets this standard. After analyzing the record, we conclude that significant public interest benefits are likely to result from this transaction. These benefits, which are likely to flow to consumers, relate to enhancements to national security and government services, efficiencies related to vertical integration, economies of scope and scale, and cost savings. We further conclude that, in light of the consent decree executed between the Department of Justice and the Applicants (DOJ Consent Decree),⁶ the transaction is not likely to have anticompetitive effects in the relevant markets discussed below. Moreover, to the extent that the merger increases concentration in relevant markets, we find that the public interest benefits of the merger outweigh any potential public interest harms. Finally, we note that the Applicants have offered certain voluntary commitments.⁷ Because we find these commitments will serve the public interest, we accept them and adopt them as conditions of our approval of the merger.

II. EXECUTIVE SUMMARY

3. As discussed below, our analysis of the competitive effects of the merger, which focuses on the following key services, finds that the merger is not likely to result in anticompetitive effects in relevant markets.

- **Special access competition.** The record indicates that, in a limited number of buildings where SBC and AT&T are the only carriers with direct connections, the merger is likely to have an anticompetitive effect on the market for Type I wholesale special access services. We find, however, that the DOJ Consent Decree adequately addresses these likely anticompetitive effects. With respect to Type II wholesale special access services, we find that other competitors with similar types of local facilities will remain post-merger to help mitigate the loss of AT&T.
- **Retail enterprise competition.** We find that the merger will not likely have anticompetitive effects for enterprise customers, even though we find that the Applicants currently compete against each other with respect to a range of enterprise customer classes and enterprise services. We find that competition for medium and large enterprise customers should remain strong after the merger because medium and large enterprise customers are sophisticated, high-volume

⁵ *Sprint/Nextel Order*, FCC 05-148 at para. 20; *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, 19987 at para. 2 (1997) (*Bell Atlantic/NYNEX Order*); *Merger of MCI Communications Corp. and British Telecommunications PLC*, GN Docket No. 96-245, Memorandum Opinion and Order, 12 FCC Rcd 15351, 15353 at para. 2 (1997) (*BT/MCI Order*).

⁶ *United States v. SBC Communications, Inc.*, Civil Action No. 1:05CV02102, Final Judgment (D.D.C. filed Oct. 27, 2005) (*DOJ-SBC/AT&T Consent Decree*); see also *United States v. SBC Communications, Inc.*, Civil Action No. 1:05CV02102, Complaint (D.D.C. filed Oct. 27, 2005) (*DOJ-SBC/AT&T Complaint*).

⁷ See generally Letter from Thomas F. Hughes, Vice President-Federal Regulatory, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, Attach. (filed Oct. 31, 2005) (SBC Oct. 31 *Ex Parte* Letter); see also Appendix F.

purchasers of communications services that demand high-capacity communications services, and because there will remain a significant number of carriers competing in the market. With respect to small enterprise customers, we recognize that AT&T had announced its gradual withdrawal from that market, and we conclude after examining the record that it was not exerting significant competitive pressure with respect to those customers.

- **Mass market competition.** We conclude that the merger will not likely have anticompetitive effects in the mass market. While AT&T currently retains a significant share of mass market customers, we find, as with small business customers, that AT&T has ceased marketing mass market services and has been gradually withdrawing from that market. Consequently, we find that, immediately prior to the announcement of the merger, AT&T was not exerting significant competitive pressure on SBC within SBC's own region. Moreover, we note the rapid growth of intermodal competitors – particularly cable telephony providers (whether circuit-switched or voice over IP (VoIP)) – as an increasingly significant competitive force in this market, and we anticipate that such competitors likely will play an increasingly important role with respect to future mass market competition.
- **Internet backbone competition.** Based on the record, we are persuaded that the merger is not likely to result in anticompetitive effects in the Internet backbone market. We do not find that the Tier 1 backbone market is likely to tip to monopoly or duopoly, based either on market share or on other factors, such as changes in relative traffic volumes or through targeted de-peering or degraded interconnection. Rather, we expect a number of Tier 1 backbones to remain as competitive alternatives to the merged entity. We also are not persuaded that the merger will increase the Applicants' incentive and/or ability to raise rivals' costs. Given the level of competition we expect to remain in the Tier 1 backbone market, we are not persuaded that such actions would be viable.
- **Wholesale interexchange competition.** We find that the merger is not likely to result in anticompetitive effects for wholesale interexchange services. We conclude that the market will remain competitive post-merger, due primarily to the presence of numerous competitive nationwide fiber networks with excess capacity.
- **International competition.** We find that the merger is not likely to result in anticompetitive effects for international services provided to mass market, enterprise, or global telecommunications services customers. Additionally, we find that the merger is not likely to result in anticompetitive effects in the international transport, facilities-based IMTS, or international private line markets.
- **Applicants' commitments.** The Applicants offered certain voluntary commitments related to special access, stand-alone DSL, the Commission's Internet Policy Statement, and Internet backbone services. Because we find these commitments serve the public interest, we accept them and adopt them as express conditions of our merger approval.

4. Accordingly, based on the record, we find that the merger of SBC with AT&T is in the public interest and we grant the applications for transfer of control.

III. BACKGROUND

A. Description of the Applicants

1. AT&T Corp.

5. AT&T, a publicly-traded corporation incorporated under the laws of the State of New York in 1885, and headquartered in Bedminster, New Jersey,⁸ is one of the nation's largest providers of local exchange, long distance, and international telecommunications services. Today, AT&T provides telecommunications services through two principal divisions – a business services division and a consumer services division. AT&T owns, operates, monitors and maintains extensive communications networks, and holds numerous Commission licenses and authorizations, including domestic and international section 214 authorizations, wireless and earth station licenses, and interests in submarine cable landing licenses, with facilities in countries and cities throughout North America, Latin America, Europe, Africa, and the Asia-Pacific region.⁹

6. AT&T Business Services (ABS) provides a variety of communications services to domestic and multi-national businesses and government agencies.¹⁰ These services include “retail and wholesale domestic and international voice services, and a wide range of retail and wholesale IP and other data transport and managed data services.”¹¹ AT&T is one of the most significant providers of communications services to the United States government.¹² It provides services that include capabilities for the highest levels of security, reliability, recoverability, and global coverage.¹³ Because of these network capabilities, AT&T is also an established provider to many of the largest businesses and

⁸ AT&T Corporation, SEC Form 10-K at 1 (filed Apr. 28, 2005), *available at* <http://www.sec.gov/Archives/edgar/data/5907/000095012305002878/y06520e10vk.txt> (AT&T 2004 Form 10-K).

⁹ SBC/AT&T Application, App. A at A-1 – A-3; Applications for Approval of Transfer of Control, WC Docket No. 05-65, Electronically Filed Applications; *Public Notice* at 2-3 (listing international section 214 authorizations, cable landing licenses, satellite earth station authorizations, and wireless radio service licenses for which AT&T is seeking to transfer control to SBC); Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed Sept. 29, 2005) (minor amendment to File No. SES-T/C-200500232); Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed Sept. 29, 2005) (minor amendment to File Nos. SES-T/C-20050224-00230; SES-T/C-200501224-00231); Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed Sept. 29, 2005) (minor amendment to File Nos. ITC-T/C-20050224-00072 *et al.*, SCL-T/C-20050222-0002); Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed Sept. 29, 2005) (minor amendment to File No. 0012-EX-TU-2005, Confirmation No. EL656885); Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed Sept. 29, 2005) (adding call sign S2379 inadvertently omitted from FCC Form 312-Alascom); Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed Sept. 29, 2005) (minor amendment to File No. 0002052535); Letter from Mark D. Schneider, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed Sept. 29, 2005) (minor amendment to File No. 0002052427); *see also* Appendix B.

¹⁰ SBC/AT&T Application, App. A at A-1.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

wholesale customers, including those with requirements in multiple, widely dispersed locations in this country and around the world.¹⁴ Revenues from business services provided by AT&T were \$22.6 billion in 2004.¹⁵ As a result of significant competitive pressure, these revenues have declined more than 18 percent over the past four years.¹⁶

7. AT&T Consumer Services (ACS) provides communications services to AT&T's remaining mass market customers and small/home-based businesses.¹⁷ These services include traditional long distance voice services, such as domestic and international dial and toll-free voice services, as well as operator-assisted services.¹⁸ Approximately 65 percent of AT&T consumer services revenue is from stand-alone long distance offerings.¹⁹ In addition, AT&T provides dial-up Internet services and local exchange services, and often relies upon unbundled network element platform (UNE-P) arrangements with incumbent local exchange carriers (incumbent LECs) such as SBC.²⁰ AT&T's local services constitute about 35 percent of consumer services revenue, and are usually bundled with its facilities-based long distance services to provide all-distance voice services.²¹ In mid-2004, AT&T announced that it would no longer actively compete for new mass market customers.²²

2. SBC Communications Inc.

8. SBC is a publicly-traded Delaware corporation, headquartered in San Antonio, Texas.²³ Through its operating subsidiaries, SBC provides communications services and products to businesses and consumers in the United States.²⁴ SBC's products and services vary by market, and include local exchange services, wireless communications, long distance services, Internet services, telecommunications equipment, network access, and directory advertising and publishing.²⁵ SBC also

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Last year's revenues for services provided by ABS were down from \$25.1 billion in 2003, \$26.6 billion in 2002, and \$27.7 billion in 2001. *Id.*; AT&T, 2002 Annual Report at 12 *available at* http://www.att.com/ar/docs/annualreport_2002.pdf (AT&T 2002 Annual Report).

¹⁷ SBC/AT&T Application, App. A at A-1-A-2.

¹⁸ *Id.*

¹⁹ SBC/AT&T Application, Declaration of Dennis W. Carlton and Hal S. Sider (SBC/AT&T Carlton/Sider Decl.) at para. 41. Specifically, ACS earned approximately \$5.2 billion for stand-alone long distance, transactional and other services in 2004. AT&T, AT&T Corp. Fourth-Quarter and Full-Year 2004 Financial Results, Historical Segment Data (Jan. 20, 2005) *available at* http://www.att.com/ir/pdf/4q04_financials.pdf (AT&T 2004 Financials).

²⁰ SBC/AT&T Application, App. A at A-1-A-2.

²¹ SBC/AT&T Carlton/Sider Decl. at para. 41. Specifically, ACS earned approximately \$2.7 billion for bundles of local and long distance services in 2004. AT&T 2004 Financials, Historical Segment Data.

²² SBC/AT&T Application, App. A at A-2.

²³ SBC Communications Inc., SEC Form 10-K at 1 (filed Mar. 11, 2005), *available at* <http://www.sec.gov/Archives/edgar/data/732717/000073271705000176/form10k.htm> (SBC 2004 Form 10-K).

²⁴ *Id.*

²⁵ *Id.* SBC publishes Yellow and White Pages directories and electronic directories. *Id.* at 4.

offers satellite television services through an arrangement with EchoStar Communications Corp.²⁶ In addition, SBC has investments in communications companies with operations in 14 countries.²⁷

9. SBC was created as one of several regional holding companies to hold AT&T's local telephone companies.²⁸ Originally, SBC operated in five southwestern states, but it expanded its operation to 13 states through mergers with Pacific Telesis Group, Southern New England Telecommunications Corporation, and Ameritech Corporation in 1997, 1998, and 1999, respectively.²⁹ Currently, SBC provides telecommunications services in Arkansas, California, Connecticut, Illinois, Indiana, Kansas, Michigan, Missouri, Nevada, Ohio, Oklahoma, Texas, and Wisconsin,³⁰ and serves a total of approximately 52 million local access lines in-region.³¹

10. SBC provides landline telecommunications services, including local and long distance voice, data, and messaging services, on a retail and wholesale basis.³² Although SBC is authorized to offer long distance services nationwide, it provides long distance and international services primarily to customers in its region and to customers in selected areas outside of its wireline subsidiaries' operating areas.³³ SBC also provides various data services, such as switched and dedicated transport, Internet access and network integration, and sells data equipment.³⁴ SBC's Internet offerings include basic dial-up access service, dedicated access, web hosting, e-mail, and high-speed access, such as digital subscriber line (DSL), services.³⁵ SBC also holds a 60 percent economic interest and 50 percent voting interest in

²⁶ *Id.* at 1.

²⁷ *Id.* at 1. The international investments include companies that provide local and long distance telephone services, wireless communications, voice messaging, data services, Internet access, telecommunications equipment, and directory publishing. *See id.* at 5-6.

²⁸ *Id.* at 1. On January 1, 1984, SBC was spun off from AT&T Corp. as a result of a 1982 antitrust consent decree. *Id.*; *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

²⁹ SBC 2004 Form 10-K at 1; *Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Pacific Telesis Group and its Subsidiaries*, Report No. LB-96-32, Memorandum Opinion and Order, 12 FCC Rcd 2624 (1997) (*SBC/PacTel Order*); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor To SBC Communications, Inc., Transferee*, CC Docket No. 98-25, Memorandum Opinion and Order, 13 FCC Rcd 21292, 21306, para. 29 (1998) (*SBC/SNET Order*); *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer of Control*, Memorandum Opinion and Order, CC Docket No. 98-141, 14 FCC Rcd 14712, 14737, para. 48 (1999) (*SBC/Ameritech Order*).

³⁰ SBC 2004 Form 10-K at 1.

³¹ SBC Communications Inc., *SBC Investor Briefing No. 246, SBC To Acquire AT&T, Creates Premier, Global Provider for New Era of Communications* at 2 (Jan. 31, 2005), available at http://sbc.merger-news.com/downloads/sbc_att_IB.pdf (SBC Jan. 2005 Investor Briefing).

³² SBC 2004 Form 10-K at 3.

³³ *Id.* at 2.

³⁴ *Id.* at 4. Network integration services include installation of business data systems, local area networking, and other data networking offerings. *Id.*

³⁵ *Id.* SBC has approximately 5.1 million digital subscriber lines (DSL). SBC Jan. 2005 Investor Briefing at 2-3.

Cingular Wireless.³⁶ Through Cingular, SBC provides wireless services nationwide, and with Cingular's alliances with other GSM-based providers, Cingular offers coverage in 170 countries worldwide.³⁷ SBC markets many of its services, including local and long distance, DSL, and satellite television, along with Cingular wireless service, as bundled offerings.³⁸

B. Description of the Transaction

11. In July and November 2004, members of AT&T's and SBC's management held discussions on a possible merger.³⁹ In January 2005, AT&T's and SBC's management again held discussions, and on January 30, 2005, AT&T and SBC entered into a merger agreement ("Merger Agreement"). According to the terms and conditions of the Merger Agreement, a wholly-owned subsidiary of SBC will merge with AT&T, and AT&T will thereby become a wholly-owned subsidiary of SBC.⁴⁰ Pursuant to the Merger Agreement, each share of AT&T stock will be converted into 0.77942 shares of SBC common stock.⁴¹ AT&T will continue to own the stock of its subsidiaries, and AT&T and its subsidiaries will continue to hold all of the Commission licenses and authorizations that they held prior to the merger.⁴² SBC will become the new parent of AT&T, resulting in the indirect transfer of control of the Commission licenses and authorizations.⁴³

12. The Applicants contend that approval of the proposed transaction is in the public interest. They assert that "[t]he public will benefit from the merger's creation of a vigorous U.S. carrier with global reach,"⁴⁴ and claim that the merger will strengthen national security by enabling AT&T, as a robust, U.S.-owned carrier, to improve and expand the important services it provides to numerous government customers.⁴⁵ Finally, the Applicants assert that the merger will increase innovation and investment in the

³⁶ SBC Jan. 2005 Investor Briefing at 2.

³⁷ SBC/AT&T Application at 10.

³⁸ SBC Communications Inc., 2004 Annual Report 7, 11, 22, 28 (Feb. 25, 2005), *available at* http://www.sbc.com/investor_relations/company_reports_and_sec_filings/SBC_2004_AR.pdf (SBC 2004 Annual Report).

³⁹ AT&T Corp., SEC Schedule 14A at 28 (filed May 23, 2005) *available at* <http://www.sec.gov/Archives/edgar/data/5907/000095012305006605/y04651dmdefm14a.htm> (AT&T 2005 Proxy Statement). AT&T also was having discussions with six other third parties, and exchanged confidential information with one of them. *Id.*

⁴⁰ SBC/AT&T Application at 11.

⁴¹ *Id.* In addition, prior to the closing of the merger, AT&T will pay its shareholders a special dividend in cash, in the amount of \$1.30 per share of AT&T common stock. *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 4.

⁴⁵ *Id.*

telecommunications industry, as the companies will have greater incentives to invest in research and development.⁴⁶

13. The Applicants also assert that the merger will not reduce competition. The Applicants argue that the two companies' services are "largely complementary."⁴⁷ They contend that AT&T focuses on national and global enterprise customers, while SBC focuses on residential consumers and regional businesses.⁴⁸ They also contend that there are numerous other competitors in each market segment in which they compete.⁴⁹ Finally, they suggest that the market definitions the Commission has traditionally applied in merger proceedings may not be suitable given the continual advances in communications technologies, the substitution of services based on Internet Protocol (IP) for circuit-switched services, and the substitution of wireless services for traditional wireline services.⁵⁰

C. Applications and Review Process

1. Commission Review

14. On February 21, 2005, SBC and AT&T jointly filed a series of applications seeking Commission approval of the proposed transfer of control of licenses and authorizations held by AT&T and its subsidiaries to SBC.⁵¹ On March 11, 2005, the Wireline Competition Bureau released a Public Notice seeking public comment on the proposed transaction.⁵² In response to the Public Notice, more than 50 parties filed petitions to deny the applications or formal comments supporting or opposing grant

⁴⁶ *Id.* at 5.

⁴⁷ *Id.* at 6.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 5-6.

⁵¹ Pursuant to section 214 of the Communications Act, SBC and AT&T filed applications seeking Commission approval to transfer to SBC control of domestic and international section 214 authorizations held by AT&T and its subsidiaries. 47 U.S.C. § 214. The Applicants also filed an application for consent to transfer control of AT&T's interests in submarine cable landing license to SBC pursuant to section 2 of the Cable Landing License Act. 47 U.S.C. § 35. Pursuant to section 310(d) of the Communications Act, SBC and AT&T filed applications seeking Commission approval to transfer to SBC control of wireless and earth station licenses and authorizations held by AT&T and various subsidiaries, and filed an application for Commission approval to transfer control of Experimental Radio Service Licenses from AT&T to SBC. 47 U.S.C. § 310(d); *see also* Appendix B (listing licenses and authorizations subject to transfer of control).

⁵² *Public Notice.* The Public Notice set due dates of April 25, 2005 for the filing of Comments and Petitions to Deny and May 10, 2005 for Responses and Oppositions. *Id.* The Wireline Competition Bureau (Bureau) adopted protective orders under which third parties would be allowed to review confidential or proprietary documents. *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Order Adopting Protective Order, 20 FCC Rcd 5196 (2005) (*First Protective Order*); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Order Adopting Second Protective Order, 20 FCC Rcd 8876 (2005) (*Second Protective Order*).

of the applications.⁵³ On April 18, 2005, Wireline Competition Bureau and International Bureau staff requested additional information from the Applicants ("Information Request").⁵⁴ The Applicants' responses to the Information Request, along with their responses to additional Commission requests, are included in the record.⁵⁵

2. Department of Justice Review

15. The Antitrust Division of the U.S. Department of Justice (DOJ) reviews telecommunications mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to substantially lessen competition.⁵⁶ The Antitrust Division's review is limited solely to an examination of the potential competitive effects of the acquisition, without reference to national security, law enforcement, or other public interest considerations. The Antitrust Division reviewed the proposed merger between SBC and AT&T and entered into a consent decree with the Applicants on October 27, 2005.⁵⁷ Under the DOJ Consent Decree, the Applicants agreed to divest certain assets in the form of Indefeasible Rights of Use (IRUs) to certain buildings where only SBC and AT&T had direct connections.

⁵³ The parties that filed formal pleadings in this proceeding are listed in Appendix A. In addition to those formal pleadings, we have received informal comments and *ex parte* submissions. All pleadings and comments are available on the Commission's Electronic Comment Filing System (ECFS) website at www.fcc.gov/cgb/ecfs/.

⁵⁴ See Letter from Michelle M. Carey, Deputy Chief, Wireline Competition Bureau, FCC, to Patrick J. Grant, Counsel for SBC, and David L. Lawson, Counsel for AT&T, WC Docket No. 05-65 (Apr. 18, 2005) (Information Request).

⁵⁵ Several petitioners and commenters raised various objections to the manner in which information provided by the Applicants was made available for their review. See Letter from Brad E. Mutschelknaus *et al.*, Counsel for Cbeyond *et al.*, to Kevin J. Martin, Chairman, FCC, WC Docket Nos. 05-65, 05-75 (filed May 25, 2005); Letter from Gary R. Lytle, Senior Vice President – Federal Relations, Qwest, to Kevin J. Martin, Chairman, FCC, WC Docket Nos. 05-65, 05-75 (filed May 25, 2005); Letter from Brad E. Mutschelknaus *et al.*, Counsel for Cbeyond *et al.*, to Kevin J. Martin, Chairman, FCC, WC Docket Nos. 05-65, 05-75 (filed June 7, 2005); Letter from Gary R. Lytle, Senior Vice President – Federal Relations, Qwest, to Kevin J. Martin, Chairman, FCC, WC Docket Nos. 05-65, 05-75 (filed June 7, 2005); Letter from Colleen Boothby, Counsel for Ad Hoc Telecom Users, to Kevin J. Martin, Chairman, FCC, WC Docket Nos. 05-65, 05-75 (filed June 8, 2005). These complaints elicited a vigorous defense from the Applicants. See Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Kevin J. Martin, Chairman, FCC, WC Docket No. 05-65 (filed May 27, 2005); Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed June 1, 2005); Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Kevin J. Martin, Chairman, FCC, WC Docket No. 05-65 (filed June 9, 2005); Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Kevin J. Martin, Chairman, FCC, WC Docket No. 05-65 (filed June 13, 2005); Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Kevin J. Martin, Chairman, FCC, WC Docket No. 05-65 (filed June 15, 2005). The Commission reviewed the multiple pleadings filed on both sides, met with both the Applicants and those opposing the applications, and considered the merits of the complaints, including potential alternative mechanisms to balance the risks of granting access to certain highly confidential sensitive competitive information in electronic form against the additional benefit of such access in providing material support on issues of real controversy. Under the particular circumstances of this case, including the risks, the procedural difficulties, and the apparent success of the opponents in obtaining sufficient information on key points, either from that provided by the Applicants or from other sources (such as their own confidential records or third-party sources), we chose not to intervene further in the production process.

⁵⁶ 15 U.S.C. § 18.

⁵⁷ DOJ-SBC/AT&T Consent Decree; see also DOJ-SBC/AT&T Complaint.

IV. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

16. Pursuant to sections 214(a) and 310(d) of the Communications Act,⁵⁸ and the Cable Landing License Act,⁵⁹ the Commission must determine whether the proposed transfer of control to SBC of licenses and authorizations held by AT&T will serve the public interest, convenience, and necessity.⁶⁰ In making this determination, we first assess whether the proposed transaction complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission's rules. If the proposed transaction would not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes. The Commission then employs a balancing test weighing any potential public interest harms of the proposed transaction against the potential public interest benefits.⁶¹ The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.⁶² If we are unable to find that the proposed transaction

⁵⁸ 47 U.S.C. §§ 214(a), 310(d).

⁵⁹ 47 U.S.C. §§ 34-39. The Cable Landing License Act provides that approval of a license application may be granted "upon such terms as shall be necessary to assure just and reasonable rates and service. . . ." 47 U.S.C. § 35. The Commission does not conduct a separate public interest analysis under this statute. See, e.g., *WorldCom, Inc. and Its Subsidiaries (Debtors-in-Possession), Transferor, and MCI, Inc., Transferee*, WC Docket No. 02-215, Memorandum Opinion and Order, 18 FCC Rcd 26484, 26492, para. 12 (2003) (*WorldCom Order*); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025 (1998) (*WorldCom/MCI Order*).

⁶⁰ 47 U.S.C. § 310(d) requires that we consider the applications for transfer of Title III licenses (wireless licenses and earth station authorizations in this case) under the same standard as if the proposed transferee were applying for the licenses directly under section 308 of the Act, 47 U.S.C. § 308. See *Applications of Western Wireless Corporation and Alltel Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-50, Memorandum Opinion and Order, FCC 05-138, para. 17 (rel. July 19, 2005) (*Alltel/Western Wireless Order*); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, WT Docket 04-70, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21542, para. 40 (2004) (*Cingular/AT&T Wireless Order*); *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 485, para. 18 (2004) (*News Corp./Hughes Order*). Thus, we must examine the Applicants' qualifications to hold licenses. See discussion *infra* at Part V.H (SBC's Qualifications to Acquire Control of AT&T's Licenses).

⁶¹ See, e.g., *Sprint/Nextel Order*, FCC 05-148 at para. 20; *Alltel/Western Wireless Order*, FCC 05-138 at para. 17; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21542-43, para. 40; *News Corp./Hughes Order*, 19 FCC Rcd at 483, para. 15; *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee*, CC Docket 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14046, paras. 20, 22 (2002) (*Bell Atlantic/GTE Order*); *Applications of VoiceStream Wireless Corporation and Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee*, IB Docket No. 00-187, Memorandum Opinion and Order, 16 FCC Rcd 9779, 9789, para. 17 (2001) (*Deutsche Telekom/VoiceStream Order*); *SBC/Ameritech Order*, 14 FCC Rcd at 14737-38, para. 48; *WorldCom/MCI Order*, 13 FCC Rcd at 18031, para. 10; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19987, para. 2.

⁶² See, e.g., *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21542-44, para. 40 (citing *Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to subsidiaries of Cingular Wireless LLC*, WT Docket 03-217, Memorandum Opinion and Order, 19 FCC Rcd 2570, 2581, para. 24 (2004) (*Cingular/NextWave Order*); *News Corp./Hughes Order*, 19 FCC Rcd at 483, para. 15; *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70, Memorandum Opinion and Order, (continued....)

serves the public interest for any reason, or if the record presents a substantial and material question of fact, we may designate the application for hearing.⁶³

17. Our public interest evaluation necessarily encompasses the “broad aims of the Communications Act,”⁶⁴ which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest.⁶⁵ Our public interest analysis may also entail assessing whether the merger will affect the quality of communications services or will result in the provision of new or additional services to consumers.⁶⁶ In conducting this

(Continued from previous page)

17 FCC Rcd 23246, 23255, para. 26 (2002) (*AT&T/Comcast Order*); *Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee)*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, 20574, para. 25 (2002) (*EchoStar/DirecTV Order*); *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14046, para. 22; *Applications of SBC Communications Inc. and BellSouth Corporation*, 15 FCC Rcd 25459, 25464, para. 13 (*BellSouth/SBC Order*); *Applications of Vodafone Airtouch, PLC and Bell Atlantic Corporation*, File Nos. 0000032969, et al., Memorandum Opinion and Order, 15 FCC Rcd 16507, 16512, para. 13; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 98-178, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3169-70, para. 15 (1999) (*AT&T/TCI Order*); *WorldCom/MCI Order*, 13 FCC Rcd at 18031-32, para. 10).

⁶³ We are not required to designate for hearing applications for the transfer or assignment of Title II authorizations when we are unable to find that the public interest would be served by granting the applications. *See ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 901 (2d Cir. 1979). We may, however, do so if we find that a hearing would be in the public interest. However, with respect to the applications to transfer licenses subject to Title III of the Act, if we are unable to find that the proposed transaction serves the public interest, or if the record presents a substantial and material question of fact, section 309(e) of the Act requires that we designate the application for hearing. 47 U.S.C. § 309(e); *see EchoStar/DirecTV Order*, 17 FCC Rcd at 20574, para. 25; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21542-44, para. 40.

⁶⁴ *See Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544, para. 41 (citing *News Corp./Hughes Order*, 19 FCC Rcd at 483-84, para. 16; *AT&T/Comcast Order*, 17 FCC Rcd at 23255, para. 27; *EchoStar/DirecTV Order*, 17 FCC Rcd at 20575, para. 26; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251, Memorandum Opinion and Order, 15 FCC Rcd 9816, 9821, para. 11 (2000) (*AT&T/MediaOne Order*); *AT&T Corp., British Telecommunications, plc, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications for Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses*, IB Docket No. 98-212, Memorandum Opinion and Order, 14 FCC Rcd 19140, 19146-47, para. 14 (1999) (*AT&T/British Telecom Order*); *WorldCom/MCI Order*, 13 FCC Rcd at 18030-31, para. 9).

⁶⁵ *See* 47 U.S.C. §§ 157 nt. (incorporating section 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996) (1996 Act), 254, 332(c)(7)); 1996 Act, Preamble; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544, para. 41; *see also Cingular/NextWave Order*, 19 FCC Rcd at 2583-84, para. 29; *WorldCom/MCI Order*, 13 FCC Rcd at 18030-31, para. 9; *2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, Report and Order, 16 FCC Rcd 22668, 22696, para. 55 (2001) (citing 47 U.S.C. §§ 301, 303, 309(j), 310(d)); *cf.* 47 U.S.C. §§ 521(4), 532(a).

⁶⁶ *See Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544, para. 41 (citing *AT&T/Comcast Order*, 17 FCC Rcd at 23255, para. 27; *AT&T/MediaOne Order*, 15 FCC Rcd at 9821-22, para. 11; *WorldCom/MCI Order*, 13 FCC Rcd at 18030-31, para. 9).

analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.⁶⁷

18. In determining the competitive effects of the merger, our analysis is informed by, but not limited to, traditional antitrust principles.⁶⁸ The Commission and the DOJ each have independent authority to examine telecommunications mergers, but the standards governing the Commission's review differ from those of the DOJ.⁶⁹ As stated above, the DOJ reviews mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to lessen competition substantially in any line of commerce.⁷⁰ The Commission, on the other hand, as stated above, is charged with determining whether the transfer of control serves the broader public interest. In the communications industry, competition is shaped not only by antitrust rules, but also by the regulatory policies that govern the interactions of industry players.⁷¹ In addition to considering whether the merger will reduce existing competition, therefore, we also must focus on whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets and the merger's effect on future competition.⁷² We also recognize that the same consequences of a proposed merger that are beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.⁷³

19. Our public interest authority also enables us to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.⁷⁴ Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions not

⁶⁷ See *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544, para. 41.

⁶⁸ See, e.g., *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42; *News Corp./Hughes Order*, 19 FCC Rcd at 484, para. 17; *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14046, para. 23; *WorldCom/MCI Order*, 13 FCC Rcd at 18033, para. 13.

⁶⁹ See, e.g., *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42; *News Corp./Hughes Order*, 19 FCC Rcd at 484, para. 17; see also *Satellite Business Systems*, 62 FCC 2d 997, 1088 (1977), *aff'd sub nom. United States v. FCC*, 652 F.2d 72 (DC Cir. 1980) (*en banc*); *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply").

⁷⁰ 15 U.S.C. § 18.

⁷¹ See *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42; *AT&T/Comcast Order*, 17 FCC Rcd at 23256, para. 28.

⁷² See *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42; *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14047, para. 23; *AT&T/British Telecom Order*, 14 FCC Rcd at 19148, para. 15.

⁷³ See, e.g., *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6550, 6553, paras. 5, 15 (2001) (*AOL/Time Warner Order*); *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 42.

⁷⁴ See, e.g., *Alltel/Western Wireless Order*, FCC 05-138 at para. 21 (conditioning approval on the divestiture of operating units in specified markets); *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21545-46, para. 43 (same); see also *WorldCom/MCI Order*, 13 FCC Rcd at 18032, para. 10 (conditioning approval on the divestiture of MCI's Internet assets).

inconsistent with law that may be necessary to carry out the provisions of the Act.⁷⁵ Similarly, section 214(c) of the Act authorizes the Commission to attach to the certificate “such terms and conditions as in its judgment the public convenience and necessity may require.”⁷⁶ Indeed, unlike the role of antitrust enforcement agencies, our public interest authority enables us to impose and enforce conditions based upon our extensive regulatory and enforcement experience to ensure that the merger will, overall, serve the public interest.⁷⁷ Despite broad authority, the Commission has held that it will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms)⁷⁸ and that are related to the Commission’s responsibilities under the Communications Act and related statutes.⁷⁹ Thus, we will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.

V. POTENTIAL PUBLIC INTEREST HARMS

A. Analytical Framework

20. In this section, we consider the potential public interest harms, including potential harms to competition, arising from the merger. Because SBC and AT&T currently compete with respect to a wide variety of services and groups of customers, we must consider the potential horizontal effects of this merger.⁸⁰ In addition, because both SBC and AT&T provide critical inputs, particularly special access services, to various communications markets, we need to consider the potential vertical effects of the merger – specifically, whether the merged entity will have an increased incentive or ability to injure competitors by raising the cost of, or discriminating in the provision of, inputs sold to competitors.⁸¹

21. With respect to the horizontal effects, consistent with Commission precedent, we first perform a structural analysis of the merger to examine whether it is likely to result in anticompetitive effects.⁸² We

⁷⁵ 47 U.S.C. § 303(r).

⁷⁶ 47 U.S.C. § 214(c); *see also* *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21545-46, para. 43; *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14047, para. 24; *AT&T/British Telecom Order*, 14 FCC Rcd at 19148, para. 15.

⁷⁷ 47 U.S.C. § 303(r); *see, e.g.*, *Alltel/Western Wireless Order*, FCC 05-138 at para. 21; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21545-46, para. 43; *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14047, para. 24; *WorldCom/MCI Order*, 13 FCC Rcd at 18032, para. 10; *FCC v. Nat’l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989).

⁷⁸ *See Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 43; *News Corp./Hughes Order*, 19 FCC Rcd at 534, para. 131.

⁷⁹ *See Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21544-45, para. 43.

⁸⁰ A transaction is said to be horizontal when the firms in the transaction sell products that are in the same relevant markets and are therefore viewed as reasonable substitutes by purchasers of the products. *News Corp./Hughes Order*, 19 FCC Rcd at 507, para. 69.

⁸¹ *Id.* at 508, para. 71.

⁸² Structural merger analysis, as the name suggests, considers structural characteristics of the merging firms and the relevant markets, such as market shares and entry conditions, to make predictions about the likely competitive effects of a proposed merger.

begin by defining the relevant product markets⁸³ and relevant geographic markets.⁸⁴ We next identify market participants and examine market concentration and how concentration will change as a result of the merger. We also consider whether entry conditions are such that new competitors could likely enter and defeat any attempted post-merger price increase.

22. If our structural analysis suggests that the merger may have anticompetitive effects, we must then examine in more detail whether and how the merger might affect competitive behavior. In performing this behavioral analysis, we consider whether the merger is likely to have anticompetitive effects either through unilateral actions of the merged entity or through coordinated interaction among firms competing in the relevant market.⁸⁵

23. With regard to potential vertical effects, we will examine how the merger affects the Applicants' incentives and ability to discriminate in provisioning inputs to competitors. In particular, we will consider the effect of the merger on the merged entity's incentives and ability to discriminate in the provision of special access services.

B. Wholesale Special Access Competition

24. In this section, we consider the effects of the merger of SBC and AT&T on the provisioning and pricing of wholesale special access services. The Commission has previously defined special access as a dedicated transmission link between two places.⁸⁶ As discussed below, wholesale special access service

⁸³ A relevant product market has been defined as the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a "small but significant and nontransitory" increase in price." Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission, (Apr. 2, 1992, revised Apr. 8, 1997) §§ 1.11, 1.12 (*DOJ/FTC Guidelines*); see also *EchoStar/DirecTV Order*, 17 FCC Rcd at 20605-6, para. 106.

⁸⁴ A relevant geographic market has been defined "as the region where a hypothetical monopolist that is the only producer of the relevant product in the region would profitably impose at least a 'small but significant and nontransitory' increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change." *EchoStar/DirecTV Order*, 17 FCC Rcd at 20609, para. 117 (citing *DOJ/FTC Guidelines* § 1.21).

⁸⁵ *Id.* at 20619, para. 151. As the Commission explained in the *EchoStar/DirecTV Order*:

Unilateral effects arise when the merging firm finds it profitable to alter its behavior following the merger. Examples of unilateral effects include a merging firm's raising its price or reducing the quantity it supplies. Coordinated effects, in contrast, arise when competing firms, recognizing their interdependence, take actions "that are profitable for each of them only as a result of the accommodating reactions of others." Because coordinated effects generally are more likely the smaller the number of firms in a market, mergers may significantly increase the likelihood of coordinated effects by reducing the number of firms. Examples include explicit collusion, tacit collusion, and price leadership. *Id.* at 20619, para. 152 (footnotes omitted).

⁸⁶ See *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 1997, para. 7 (2005) (*Special Access NPRM*). We recognize that different companies, particularly carriers that are not incumbent LECs, may use slightly different terms to refer to dedicated loop and transport links between two points. For example, AT&T uses the terms "Local Private Line" and "Domestic Private Line" to refer to services consisting of loops and transport, typically in combination that generally compete directly with SBC's special access services. See, e.g., *SBC/AT&T Carlton/Sider Reply Decl.* at para. 9 n.5; *DOJ-SBC/AT&T Complaint* at para. 13. For simplicity, we will use the term "special access" to refer to all services provided by any carrier that involves such dedicated links.

is a critical input for: competitive LECs in providing services to their retail enterprise customers, wireless and competitive LECs in connecting their networks to other carriers, long distance carriers seeking to connect customers to their long-distance networks, and entities seeking to connect with Internet backbones.⁸⁷ Firms needing dedicated transmission links essentially have three choices: to deploy their own facilities, to buy special access service from incumbent LECs, or to purchase such service from a competing special access provider. As discussed below, we find that AT&T provides special access services in competition with SBC's special access services, and that the merger, absent appropriate remedies, is likely to result in anticompetitive effects for wholesale special access services offered wholly over AT&T's own facilities to certain buildings. We conclude, however, that the consent decree, entered into between the Applicants and the DOJ, pursuant to which the Applicants agreed to certain divestitures in the form of IRUs for loops and transport necessary to reach to certain buildings where AT&T is the only competitive LEC that has a direct wireline connection, should remedy any likely anticompetitive effects. Moreover, we find further comfort in certain voluntary commitments, which the Applicants have offered. Accordingly, we adopt the proffered commitments as express conditions of our approval of the transfer of licenses and authorizations from AT&T to SBC.

1. Relevant Markets

a. Relevant Product Markets

25. As previously indicated, special access is a dedicated transmission link between two locations, most often provisioned via high-capacity circuits. Such services are used for various purposes, such as direct connection between tenants of commercial buildings and a competing carrier's network or between different facilities of the same firm. Both voice and data may be carried using special access services. The facilities used to provide special access service typically consist of three different segments: (1) an entrance facility, which connects the purchasing carrier's point of presence ("POP") to the nearest wire center, carrier hotel, or similar location ("entrance facility"); (2) local transport; and (3) a "last mile" connection or local loop, also known as a channel termination, which runs from the transport facility to the end-user customer.

26. The record demonstrates that there are at least two separate relevant product markets for special access services: "Type I" special access services, which are offered wholly over a carrier's own facilities, and "Type II" special access services, which are offered using a combination of the carrier's own facilities for two of the segments and the special access services of another carrier for the third segment.⁸⁸ The record evidence suggests that many purchasers of wholesale special access services view

⁸⁷ See *infra* Part V.C (Retail Enterprise Competition); Part V.D (Mass Market Competition); and Part V.E (Internet Backbone Competition).

⁸⁸ See, e.g., Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 8 (filed June 15, 2005) (Qwest June 15 *Ex Parte* Letter). Approximately [REDACTED] of AT&T's wholesale DS3 and lower-capacity special access services are Type II. Response of AT&T Corp. to the Commission's April 18, 2005 Information and Document Request, WC Docket No. 05-65, Exh. 5(c) II – 5(c) VI (filed May 9, 2005) (AT&T Info. Req.) (Local Private Line and Domestic Private Line wholesale special access). AT&T [REDACTED] services. See Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, App. C at 2 (filed Aug. 1, 2005) (SBC/AT&T Aug. 1 *Ex Parte* Letter).

In this Order, "REDACTED" indicates that confidential or proprietary information that is subject to a Protective Order in this proceeding has been redacted from the public version of this Order. *First Protective Order*, 20 FCC Rcd at 5196; *Second Protective Order*, 20 FCC Rcd at 8876. The unredacted text is included in the confidential (continued....)

Type I services as substantially superior to Type II services, due to differences in performance, reliability, security, and price, and that these differences are sufficiently large that Type I special access services fall into a separate relevant product market from Type II.⁸⁹

27. We also recognize that the services provided over different segments of special access (e.g., channel terminations and local transport) constitute separate relevant product markets, which may be subject to varying levels of competition.⁹⁰ In the competitive analysis section below, we will discuss the competitiveness of the different special access services.

(Continued from previous page)

version of this Order, which is available upon request only to those parties who have executed and filed with the Commission signed acknowledgments of the protective orders. Qualified persons who have not yet signed the required acknowledgments may do so in order to obtain the confidential version of this Order.

Note that in some cases where both a confidential unredacted version and a redacted public version of a document were filed, the page number was inconsistent between the two documents. With respect to such documents, all citations are to the redacted version, unless otherwise specified.

⁸⁹ See, e.g., Qwest June 15 *Ex Parte* Letter, Attach. at 8; Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 7 (filed July 7, 2005) (Qwest July 7 *Ex Parte* Letter); *Cbeyond et al.* Petition, Declaration of Simon Wilkie (*Cbeyond et al.* Wilkie Decl.) at para. 17 n.6 (“[O]ther things being equal, buyers have a preference to purchase Type I circuits to avoid any reliance on the ILEC who may degrade quality or be unresponsive to service problems.”); Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, App. C at 2 (filed Aug. 1, 2005) (unredacted) (AT&T [REDACTED] services) (SBC/AT&T Aug. 1 *Ex Parte* Letter); AT&T Info. Req., ATT546000175-79 ([REDACTED]); ATT598003761-78 at 63 ([REDACTED]); ATT599000837-44 at 39-40 ([REDACTED]). We note that the analysis of Type II offerings as part of a distinct product market is consistent with the assertions of commenters that Type II services are significant, as well. See, e.g., Letter from Brad E. Mutschelknaus, et al., Counsel for Eschelon et al., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 6 (filed June 6, 2005) (Eschelon et al. June 6 *Ex Parte* Letter) (asserting that the fact that wholesale services are provisioned using Type II, rather than Type I, offerings “does not significantly diminish the competitive significance” of those offerings, and that criticisms of Type II offerings do not “account for the important role played by those facilities in the wholesale market”).

⁹⁰ We do not, however, analyze separate product markets for different capacities of special access services. See, e.g., Letter from Brad E. Mutschelknaus, Counsel for Conversent et al., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 3 (filed Aug. 31, 2005) (Conversent et al. Aug. 31 *Ex Parte* Letter) (asserting that different capacity services should be different relevant product markets). While customers in certain circumstances may be able to substitute different capacity services in different combinations to meet their needs if the price of a particular capacity circuit were raised (for example, customers could substitute multiple DS1 loops for a single DS3 loop), we believe that, in general, different capacity circuits are likely to constitute separate relevant product markets. However, we find comparable competitive alternatives for varying capacities of special access circuits, and thus for administrability purposes we do not separately analyze different capacity services. Where competing carriers offer Type I service using their own facilities, the facilities can be “channelized” to provide service at all capacity levels. See, e.g., Response of SBC Communications Inc. to Information and Document Request Dated April 18, 2005, WC Docket No. 05-65, Exh. 6(d)(3) at III-2 (filed May 9, 2005) (SBC Info. Req.); see also *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2585-86, para. 86 (2005), petitions for review filed (*Triennial Review Remand Order*). Where carriers seek to offer Type II service, they can purchase the required capacity of special access service from the incumbent or from any competitive access providers.

We note that, in prior orders addressing our section 251 unbundling rules, we conducted a capacity-based analysis. See, e.g., *Triennial Review Remand Order*, 20 FCC Rcd at 2625, para. 166 (describing the capacity-based analysis (continued....))

b. Relevant Geographic Markets

28. Consistent with Commission precedent and the record before us, we conclude that the relevant geographic market for wholesale special access services is a particular customer's location, since it would be prohibitively expensive for an enterprise customer to move its office location in order to avoid a "small but significant and nontransitory" increase in the price of special access service.⁹¹ In order to simplify its analysis, however, the Commission has traditionally aggregated or grouped customers facing similar competitive choices, and we will do so in our discussion below to the extent appropriate.⁹²

29. In addition, however, we will consider the potential effect of the merger on SBC's special access prices, which are generally set on a wider geographic basis. Because SBC has gained Phase II pricing flexibility for its special access services in some metropolitan statistical areas (MSAs),⁹³ but not others, SBC's rates for special access may vary from MSA to MSA.⁹⁴ Accordingly, we will also examine on an MSA basis how the merger is likely to affect SBC's special access prices.

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used for DS1, DS3, and dark fiber loops); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17102, para. 197 (2003) (*Triennial Review Order*), corrected by Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), *aff'd in part, vacated and remanded in part, and remanded in part*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (describing the capacity-based analysis used for DS1, DS3, OCn, and dark fiber loops). Our approach to product definitions here differs in key respects from our unbundling analysis, however. Our merger analysis focuses on special access competition generally (whether through facilities deployment or partial reliance on other carriers' special access services), whereas our high-capacity loop impairment analysis focused solely on the likelihood of competitive facilities deployment. Moreover, our location-specific analysis in the merger context focuses on those locations where AT&T offers competing special access services today, whereas the Commission applied a wire center test for high-capacity loop unbundling because a building-by-building test would not be administrable. Thus, we find no need to perform separate analyses for different capacity circuits based on the record and analytical framework here, notwithstanding our prior unbundling analyses.

⁹¹ See, e.g., *SBC/Ameritech Order*, 14 FCC Rcd at 14746, para. 69; *Applications of Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee, For Consent to Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services*, CC Docket No. 98-24, Memorandum Opinion and Order, 13 FCC Rcd 15236, 15248, para. 21 (*AT&T/TCG Order*). Our geographic market definition is consistent with the arguments made by certain commenters. See Global Crossing Comments at 10-14; Global Crossing Comments, Attach. A, Statement of Joseph Farrell at paras. 117-25 (Global Crossing Farrell Decl.); Conversent *et al.* Aug. 31 *Ex Parte* Letter at 3; *cf.* *EchoStar/DirecTV Order*, 17 FCC Rcd at 20609-12, paras. 117-125; *AT&T/Comcast Order*, 17 FCC Rcd at 23282, para. 90 (finding that the relevant geographic market was individual customer residences but that it is reasonable to aggregate to a larger geographic area); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016-19, para. 54-57 (finding that separate geographic areas were appropriately defined by the availability of similar set of services at similar prices).

⁹² See, e.g., *AT&T/Comcast Order*, 17 FCC Rcd at 23282, para. 90; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016-19, paras. 54-56; *EchoStar/DirecTV Order* 17 FCC Rcd at 20610-11, para. 120; *SBC/Ameritech Order* 14 FCC Rcd at 14746, paras. 67-68.

⁹³ *SBC/AT&T Application* at 103.

⁹⁴ We recognize that SBC also offers various volume and term discount plans which offer percentage discounts off the tariffed rate. Some discounts are based on a carrier's total spend over a larger geographic market while other (continued....)

c. Market Participants

30. SBC can access all or virtually all of the buildings and transport routes in its territory. Although the record is not clear as to what extent other competitive LECs compete in the special access market in SBC's territory, it is clear that, in addition to AT&T, [REDACTED] provide wholesale Type I, and in some cases Type II, special access services.⁹⁵ The record does not, however, clearly indicate the extent to which individual buildings are served by one or more of these competitive LECs.

2. Competitive Analysis

31. In this section, we separate our discussion of the competitive effects of the merger into the effects on the in-region special access market, both horizontal and vertical, and the effects on out-of-region special access markets.⁹⁶ We begin by considering whether the merger is likely to result in a meaningful reduction in competition or increase in price for special access services to particular locations.

32. As discussed below, we find that the elimination of AT&T as a provider of wholesale special access services is likely to result in anticompetitive effects in the provision of Type I special access services to particular buildings where AT&T is currently the sole carrier, besides SBC, with a direct wireline connection to the building, and where barriers to entry make it unlikely that other carriers will build their own facilities. Absent appropriate remedies, these building-specific effects may also lead to increases in SBC's MSA-wide special access prices.

33. With respect to Type II special access services, we conclude that the ability of remaining carriers in the market to offer competitive special access services through a combination of their own transport facilities and an incumbent LEC's special access or high-capacity unbundled loops, or a competing carrier's loop facilities, alleviates concerns about the loss of AT&T as a provider of Type II special access services to particular buildings. Further, because AT&T provides such a relatively small amount of wholesale Type II special access services within SBC's region, and because other competitive providers should be able to move in quickly to fill any void left by AT&T, we conclude that the merger is unlikely to result in an increase in the price of Type II services within SBC's region.

34. We next consider whether the merger is likely to result in anticompetitive effects in the provision of wholesale special access services in areas outside SBC's territory. In particular, we consider arguments made by certain commenters that, after the SBC/AT&T and Verizon/MCI mergers are consummated, SBC and Verizon will have an incentive to forbear from competing in the provision of wholesale special access services within each other's territories. We conclude that the merger will not result in competitive harm in Verizon's territory. We find that a variety of actual and potential competing providers will remain post-merger to fill any void left by AT&T if the merged entity does not continue to offer wholesale special access services in Verizon's territory.

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discounts may vary from MSA to MSA. See, e.g., CompTel/ALTS Petition at 15 (suggesting a regional analysis is appropriate given SBC pricing strategies).

⁹⁵ SBC/AT&T Application, Reply Declaration of Anthony Fea *et al.* (SBC/AT&T Fea *et al.* Reply Decl.) at paras. 15, 47.

⁹⁶ By "in-region," we mean the franchise areas where SBC is the incumbent LEC. Thus, "out-of-region" refers to all other regions in the U.S.

35. Finally, we consider possible vertical effects of the merger. SBC is already a vertically integrated company. We conclude that the merger, as conditioned by the DOJ Consent Decree, will not increase the merged entity's ability to increase prices for or decrease quality of wholesale special access services. To the extent that SBC, prior to the merger, had any incentive or ability to raise rivals' costs or discriminate in the provision of wholesale special access services, those issues are better addressed in pending general rulemaking proceedings.

a. Horizontal Effects

36. *Unilateral Effects.* Several commenters claim that, as a result of the merger, wholesale special access prices are likely to rise at specific buildings where AT&T is currently offering either Type I or Type II special access services.⁹⁷ As discussed in greater detail below, we believe these claims are correct in part. The record suggests that the merger will result in a reduction in the number of competitors offering Type I services in buildings where AT&T is currently connected via its own facilities, and that, absent remedial measures, this is likely to lead to an increase in the price of special access service to buildings where only SBC and AT&T own or control a direct wireline connection, and where conditions make additional facilities-based entry unlikely.⁹⁸ We further find, however, that the merger is not likely to result in anticompetitive effects in the provision of Type II services. Competing carriers can use their existing collocation facilities in the relevant wire center (or contract with a competitor that has such collocation facilities) and can purchase special access circuits or UNE loops to provide Type II services.

37. *Type I Services.* We disagree with the Applicants' assertion that "the absolute number of buildings served by AT&T is so small that AT&T's facilities cannot be considered competitively significant."⁹⁹ As discussed above, the relevant geographic market for wholesale special access services is a particular customer's location. Thus, where AT&T is the only carrier besides SBC that is directly connected to a particular building and where entry is unlikely, AT&T's elimination as a competitor may lead to an increase in the price of Type I special access services to that building. Thus, absent appropriate remedial measures, like those imposed by the DOJ Consent Decree, the proposed merger is likely to have anticompetitive effects in buildings where AT&T is the only competitive LEC with a direct wireline connection and where entry appears unlikely.

⁹⁷ See, e.g., ACN *et al.* Comments at 39-41; Broadwing and SAVVIS Petition at 22-29; Cbeyond *et al.* Petition at 22-25; CompTel/ALTS Petition at 13-15; Global Crossing Comments at 17-19; NASUCA Comments at 14-18; Qwest Petition at 12-17; Ad Hoc Telecom Users Reply at 20-23; BT Americas Reply at 13-15, 19-20; Letter from Richard M. Blau and Edward W. Kirsch, Counsel for CTC Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 4-5 (filed Sept. 21, 2005) (CTC Sept. 21 *Ex Parte* Letter); Letter from Brad E. Mutschelknaus, Counsel for BridgeCom *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, at 2 (filed Sept. 22, 2005) (BridgeCom *et al.* Sept. 22 *Ex Parte* Letter); Letter from John T. Nakahata, Counsel for Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 2 (filed Sept. 23, 2005) (Level 3 Sept. 23 *Ex Parte* Letter).

⁹⁸ In the 19 in-region MSAs where AT&T has local facilities, SBC identifies over 240,000 commercial buildings with more than 10 DS0 line equivalents, and states that AT&T provides Type I service to only 1,691 buildings in SBC's region as a whole using its own facilities—only 0.7%. See SBC/AT&T Application at 105 n.347; SBC/AT&T Reply at 30-32; Letter from Christopher M. Heimann, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 at 2-3 (filed Sept. 6, 2005) (SBC/AT&T Sept. 6 *Ex Parte* Letter).

⁹⁹ SBC/AT&T Sept. 6 *Ex Parte* Letter at 3.

38. AT&T is directly connected via its own facilities to at least 1,691 buildings in the 19 MSAs in SBC's territory where AT&T has local facilities.¹⁰⁰ AT&T has provided data indicating that AT&T is the only competitive provider to approximately [REDACTED] of those buildings.¹⁰¹

39. The record also indicates that, for many buildings, there is little potential for competitive entry, at least in the short term. As the Commission has previously recognized, carriers face substantial fixed and sunk costs, as well as operational barriers, when deploying loops, particularly where the capacity demanded is relatively limited.¹⁰² Given these barriers, it appears unlikely that a carrier would be willing to make the significant sunk investment without some assurance that it would be able to generate revenues sufficient to recover that investment.¹⁰³ Consistent with this analysis, there is evidence in the record that carriers generally are unwilling to invest in deploying their own loops unless they have a long-term retail contract that will generate sufficient revenues to allow them to recover the cost of their investment.¹⁰⁴ Moreover, even where there is adequate retail demand, the costs of constructing the loop may be sufficiently high, or there may be other operational barriers, that may deter entry.¹⁰⁵

40. This analysis is consistent with the analysis contained in the complaint that the DOJ filed in connection with this merger. In its complaint, the DOJ alleged that, in certain buildings where "SBC and AT&T are the only firms that own or control a direct wireline connection to the building," the merger was "likely to substantially reduce competition for Local Private Lines and telecommunications services that rely on Local Private Lines to those buildings."¹⁰⁶ The DOJ's complaint goes on to allege that "[a]though other CLECs can, theoretically, build their own fiber connection to each building in response to a price increase by the merged firm, such entry is a difficult, time-consuming, and expensive

¹⁰⁰ See *id.*

¹⁰¹ SBC/AT&T Sept. 6 *Ex Parte* Letter at 3; SBC/AT&T Aug. 1 *Ex Parte* Letter, App. B at 1; Letter from Gary L. Phillips, SBC, and Lawrence J. Lafaro, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, at 2 (filed June 24, 2005) (SBC/AT&T June 24 *Ex Parte* Letter). We note that AT&T's data is likely to overestimate the number of buildings where AT&T is the sole competitive LEC with a direct connection, because the data only count competitive LECs with whom AT&T has wholesale contracts. See, e.g., SBC/AT&T Sept. 6 *Ex Parte* Letter at 5; SBC/AT&T Carlton/Sider Reply Decl. at paras. 27-30.

¹⁰² See *Triennial Review Remand Order*, 20 FCC Rcd at 2615-18, paras. 149-54; see also *Triennial Review Order*, 18 FCC Rcd at 17160-62, paras. 303-306.

¹⁰³ See, e.g., Cbeyond *et al.* Petition at 23; Letter from Brad E. Mutschelknaus, Counsel for Cbeyond *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 17 (filed July 14, 2005) (Cbeyond *et al.* July 14 *Ex Parte* Letter); Letter from Thomas Cohen, Counsel for XO, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at paras. 15-21 (filed Oct. 21, 2005) (XO Oct. 21 *Ex Parte* Letter).

¹⁰⁴ See *id.*

¹⁰⁵ We are not persuaded by the Applicants' argument that Commission findings that network elements need not be unbundled pursuant to the "impairment" standard of section 251(d)(2) demonstrate that the special access market has sufficiently low entry barriers to permit sufficient and timely competitive, facilities-based entry to defeat any attempted post-merger price increase. See, e.g., SBC/AT&T Reply at 26-27, 32-33, 37-38, 41. As the Commission explained in the *Triennial Review Order*, "[t]he purposes of a market power analysis are not the purposes of section 251(d)(2). . . the Act requires only that network elements be unbundled if competing carriers are impaired without them, regardless of whether the incumbent LEC is exercising market power or the unbundling would eliminate this market power." *Triennial Review Order*, 18 FCC Rcd at 17051 at para. 109.

¹⁰⁶ DOJ-SBC/AT&T Complaint at para. 3.

process.”¹⁰⁷ The complaint further alleges that “[a]lthough entry may occur in response to a post-merger price increase in some of the buildings where AT&T is the only connected CLEC, the conditions for entry are unlikely to be met in hundreds of those buildings.”¹⁰⁸ To remedy this problem, the DOJ in the consent decree required that AT&T divest IRUs to those buildings where it was the sole CLEC with a direct connection to the building and where DOJ found entry unlikely.¹⁰⁹ We find that the terms of the consent decree should adequately remedy any likely anticompetitive effects in the provision of Type I wholesale special access services.

41. *Type II.* In buildings where a competitive LEC is not directly connected to a building via its own facilities and where customer demand may not justify the construction of competitive facilities (such as where demand is less than the OCn level), competing carriers can either combine competitive transport with special access loops or, where available, high-capacity loop UNEs purchased from SBC (*i.e.*, Type II offerings).¹¹⁰ Carriers can use their existing collocation facilities in the relevant wire center (or contract with a competitor that has such collocation facilities) and can purchase special access loops or UNEs to provide Type II services.

42. Commenters claim that AT&T has three unique advantages in supplying Type II special access services to other competing carriers: (1) AT&T obtains greater special access discounts from SBC for the loop portion of the circuit;¹¹¹ (2) AT&T has more collocations than other competitive LECs so it can use the incumbent LEC special access to a greater number of buildings;¹¹² and (3) AT&T has a more extensive fiber network and therefore can reach more commercial buildings.¹¹³ We do not find these arguments persuasive.

43. First, there is no evidence that AT&T has access to a discount plan that is not available to other providers. The Applicants assert, and opponents do not rebut, that SBC’s “MVP” volume and term discount plan, under which AT&T takes SBC special access circuits, is also available to other competitive LECs,¹¹⁴ and the Applicants state that eleven carriers in addition to AT&T subscribe to the MVP plan.¹¹⁵ Indeed, these plans are made available to others pursuant to contract tariffs or generally

¹⁰⁷ *Id.* at para. 27.

¹⁰⁸ *Id.* at para. 29.

¹⁰⁹ *DOJ-SBC/AT&T Consent Decree*, App. A.

¹¹⁰ While UNEs are not available solely for the provision of long distance or mobile wireless services, they are available for the provision of local exchange and exchange access services. *Triennial Review Remand Order*, 20 FCC Rcd at 2551-58, paras. 34-40. Carriers that obtain UNEs for the provision of local exchange or exchange access services may also provide other services using those UNEs, as well. 47 C.F.R. § 51.309(d).

¹¹¹ *CompTel/ALTS Petition* at 14; *Cbeyond et al. July 14 Ex Parte Letter* at 14.

¹¹² *Cox Comments* at 15.

¹¹³ *CompTel/ALTS Petition* at 14; *Cbeyond et al. July 14 Ex Parte Letter* at 16-21; Letter from Teresa D. Baer, Counsel for Global Crossing, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 8 (filed June 2, 2005) (*Global Crossing June 2 Ex Parte Letter*).

¹¹⁴ *SBC/AT&T Reply, Declaration of Parley C. Casto (SBC/AT&T Casto Reply Decl.)* at paras. 3-8; *SBC/AT&T Aug. 1 Ex Parte Letter*, App. C at 1-3.

¹¹⁵ *SBC/AT&T Casto Reply Decl.* at para. 6.

available tariffs. Further, the record indicates that negotiations between Qwest and SBC have led to a special access discount plan that would enable Qwest to obtain special access discounts that are double what Qwest receives under the MVP plan.¹¹⁶ Moreover, SBC provides special access discounts in a variety of ways with differing conditions in different states and regions, including discounts available even to those carriers that might not qualify for the precise discount plan used by AT&T.¹¹⁷ Indeed, the Applicants note that at least one smaller competitor receives a larger discount off the tariffed rate than does AT&T.¹¹⁸ Finally, we note that regardless of whether competitors are able to negotiate significant discounts, where competitive duplication of the last-mile facility is not economic, competing carriers will be able to rely on high-capacity loop and transport UNEs priced at Total Element Long Run Incremental Cost (TELRIC) where they are available.¹¹⁹

44. Second, existing competitive collocations and the threat of competitive entry through collocation allow for special access competition in SBC's in-region wire centers where AT&T competes today. Indeed, in the 19 MSAs in SBC's territory where AT&T currently has local facilities,¹²⁰ the Applicants indicate that AT&T only has collocations in [REDACTED] wire centers compared to the total of over [REDACTED] collocations by other competing carriers in SBC wire centers.¹²¹ Thus, other

¹¹⁶ Letter from Gary L. Phillips, General Attorney and Assistant General Counsel, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 at 2 (filed Sept. 27, 2005). Qwest states that although "[t]here were a number of areas of agreement" regarding the new special access discount plan, it has not yet finally agreed to that plan. Letter from Robert L. Connelly, Jr., Vice President – Deputy General Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 at 2-3, in Letter from Melissa Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65 (filed Oct. 5, 2005).

¹¹⁷ SBC provides special access services under tariffed rates as well as through individual contracts, as SBC has gained pricing flexibility in certain MSAs. Various volume and term discounts may apply to individual purchases or for all purchases in particular regions. Other discounts are dependent on maintaining minimum purchasing levels over several years. See, e.g., AT&T Info. Req., ATT551001558-84; ATT564000335-42. While it is not always clear how much each buyer pays, it is clear that the simple tariff rate sometimes used by commenters for comparing prices is not adequate for that purpose. See, e.g., Letter from Thomas Cohen, Counsel for SAVVIS and XO, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 5 (filed July 29, 2005) (SAVVIS/XO July 29 *Ex Parte* Letter); XO *et al.* Oct. 3 *Ex Parte* Letter, Attach. at 2-4; see also Cbeyond *et al.* Wilkie Decl. at para. 15 (discussing the review of special access RFP bid data, and stating that the incumbent LEC "rarely actively underbid[s] the posted special access rates").

¹¹⁸ SBC/AT&T Casto Reply Decl. at paras. 3-8.

¹¹⁹ In addition, we note that the Commission has found that "the availability of UNEs is itself a check on special access pricing." *Triennial Review Remand Order*, 20 FCC Rcd at 2574, para. 65.

¹²⁰ The Applicants present much of their quantifiable data in this 19 MSA grouping. These MSAs are Austin, Chicago, Cleveland, Columbus, Dallas, Detroit, Dayton, Hartford, Houston, Indianapolis, Kansas City, Los Angeles, Milwaukee, Reno, Sacramento, St. Louis, San Antonio, San Diego, and San Francisco. For analysis purposes, they also include San Jose in the San Francisco MSA and Bridgeport, CT in the Hartford MSA. SBC/AT&T Reply, Declaration of Dennis W. Carlton and Hal S. Sider (SBC/AT&T Carlton/Sider Reply Decl.) at para. 17, n.10.

¹²¹ Letter from Gary L. Phillips, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, Attach. (filed Aug. 12, 2005) (SBC Aug. 12 *Ex Parte* Letter). While XO expresses concern that summaries of the collocation data in the text of SBC/AT&T's August 12 *ex parte* letter might double-count fiber-based collocators, our analysis relies on the underlying data itself. See XO Oct. 21 *Ex Parte* Letter at 9. Further, XO cites an order by the Michigan Public Service Commission finding that SBC's collocation data, submitted for purposes of implementing the Commission's unbundling rules, had overstated the number of fiber-based collocators in one wire center. *Id.* As an initial matter, XO does not explain why the Michigan commission's interpretation of "fiber-based collocation" for (continued....)

competing carriers collectively have [REDACTED] times the number of SBC wire center collocations compared with AT&T. In addition, there are approximately [REDACTED] other competing carriers that have between [REDACTED] collocations, with an average of [REDACTED] collocations, in each of the 19 SBC MSAs where AT&T has local network facilities.¹²² Moreover, of the [REDACTED] wire centers in the 19 MSAs in SBC's territory in which AT&T has collocations,¹²³ other competing carriers are collocated in [REDACTED]. Even in those wire centers where AT&T currently is the only collocated carrier, competitors after the merger are likely to have incentives to construct substitute collocations. The extensive local fiber networks¹²⁴ already deployed by other competitors in SBC's territory indicate that these competitors are likely to find it both technically and economically feasible to construct additional collocations.¹²⁵

45. Third, the Applicants submitted maps showing the local fiber routes of AT&T and other competing carriers in the 19 MSAs where AT&T provides special access in SBC's region.¹²⁶ These maps further demonstrate that other carriers besides AT&T have fiber networks in these geographic areas. In many MSAs, some competitors appear to have more extensive networks than AT&T.¹²⁷ We conclude, therefore, that there are existing competitors with local fiber networks that reasonably could provide wholesale special access in MSAs where AT&T now operates local facilities.¹²⁸ We note that our

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purposes of implementing the Commission's unbundling rules should apply to the use of collocation data for purposes of evaluating the potential to offer Type II services. Moreover, given the overall significant extent of collocation by other competitive LECs, an overstatement of the extent of fiber-based collocation in one wire center does not alter our conclusions.

¹²² SBC Aug. 12 *Ex Parte* Letter, Attach.

¹²³ *Id.*

¹²⁴ See *infra* para. 45 (discussing evidence of competitive fiber deployment).

¹²⁵ As we have found in both the special access and UNE contexts, the presence of fiber-based collocators is a good proxy for sunk investment in fiber rings, which we find competitors are able to use in conjunction with special access or, where available, UNEs in the provision of Type II offerings. See, e.g., *Triennial Review Remand Order*, 20 FCC Rcd at 2589-95, 2625-26, paras. 96-105, 167 (discussing the inferences drawn from fiber-based collocations for purposes of our UNE rules); *Access Charge Reform: Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262, 94-1, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14265-69, paras. 81-86 (1999) (*Pricing Flexibility Order*) (describing the correlation between fiber-based collocation and sunk investment in competitive transport facilities).

¹²⁶ SBC/AT&T Sept. 6 *Ex Parte* Letter, Attach. 3.

¹²⁷ We recognize, however, that one must take care in interpreting such maps. For example, in the *Triennial Review Remand Order*, we expressed reluctance to rely on these sort of maps in the context of loop unbundling because "they fail to indicate the capacity of service being provided over the facilities described, or whether those facilities are in fact being used to provide services for which competitive LECs may use UNEs." See *Triennial Review Remand Order*, 20 FCC Rcd at 2621, para. 158 n.445. In addition, the MSA-level maps did not correspond to the wire center analysis the Commission conducted. *Id.* In the current merger context, we are simply using the maps to supplement the quantifiable collocation data and to identify the existence of competitive LEC facilities in the MSA.

¹²⁸ Competitive LECs have bought special access services from each other for some time and [REDACTED]. AT&T Info. Req., ATT551001112-54 at 52. AT&T also purchases wholesale special access service from [REDACTED] other competitive LECs in SBC territory. SBC/AT&T Fea *et al.* Reply Decl. at para. 15.

findings here are consistent with the findings underlying the Commission's high-capacity loop impairment analysis in the *Triennial Review Remand Order*.¹²⁹

46. We are also not persuaded by certain study results cited by commenters that purport to show that the removal of AT&T as a special access competitor in SBC territory would result in significant increases in bid prices for wholesale special access services.¹³⁰ Commenters have alleged that their analysis of particular carriers' special access bid data shows that AT&T and MCI were the most frequent bidders to offer competitive special access services and that regression analyses of a large sample of bids submitted in response to competitors' RFPs demonstrates that removal of AT&T from SBC territory would result in a doubling of bid prices.¹³¹ As an initial matter, Applicants have noted the difficulty in relying on these assertions since neither the majority of commenters' source data nor even the underlying methodologies used for the analyses are in the public record and have not been subject to examination by opposing parties.¹³² Further, these analyses appear to conflate Type I and Type II special access offerings, which, as we find above, are in separate relevant product markets.¹³³ Consequently, we do not

¹²⁹ In the *Triennial Review Remand Order*, the Commission drew inferences that requesting carriers were not impaired without unbundled access to DS1 and DS3 loops in wire centers with a significant number of business lines and fiber-based collocators. See *Triennial Review Remand Order*, 20 FCC Rcd at 2622-23, para. 161. The Commission further noted that in those wire centers where high-capacity loop unbundling was eliminated, carriers could compete using incumbent LEC or third party special access to serve particular buildings to the extent that competitive facilities cannot economically be deployed. See *id.* at 2623-24, para. 163. For various reasons, the Commission did not directly rely on the availability of special access as precluding the need for unbundling. See generally *id.* at 2560-71, paras. 46-63. In the *Triennial Review Remand Order*, the Commission was evaluating whether a requesting carrier would be impaired without access to a UNE, whereas here we are evaluating the merger's effects on competition in the market for special access. Consequently, we find it appropriate here to rely on competing carriers' ability to use Type II special access facilities given the evidence in the record on all sides regarding successful special access competition provided by Type II service offerings. Cf. SBC/AT&T Reply at 27, 39 (contending that the Commission's high-capacity loop impairment analysis suggests that competitive alternatives would remain for AT&T's lit buildings).

¹³⁰ ACN *et al.* Comments at 35; Broadwing and SAVVIS Petition, Declaration of Mark Pietro (Broadwing Pietro Decl.) at para. 18; CompTel/ALTS Petition at 27; Ad Hoc Telecom Users Reply at 20-22; BT Americas Reply at 15-16; Letter from Richard M. Blau and Edward W Kirsch, Counsel for CTC Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 4-5 (filed Sept. 21, 2005) (CTC Sept. 21 *Ex Parte* Letter); Letter from Brad E. Mutschelknaus, Counsel for BridgeCom *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75 at 2 (filed Sept. 22, 2005) (BridgeCom *et al.* Sept. 22 *Ex Parte* Letter); Letter from John T. Nakahata, Counsel for Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 2 (filed Sept. 23, 2005) (Level 3 Sept. 23 *Ex Parte* Letter).

¹³¹ Cbeyond *et al.* Wilkie Decl. at paras. 14-16, 23-27 ("[f]or those circuits where competition is eliminated and the requesting carrier is left with the current special access tariff, prices will rise approximately 100%."); see also Letter from Brad E. Mutschelknaus, *et al.*, Counsel for Eschelon *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. (filed May 10, 2005) (Eschelon *et al.* May 10 *Ex Parte* Letter); SAVVIS/XO July 29 *Ex Parte* Letter, Attach. at 5; Letter from Teresa D. Baer, Counsel for Global Crossing, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 3 (filed Sept. 7, 2005) (Global Crossing Sept. 7 *Ex Parte* Letter) (comparing certain AT&T, MCI, and BOC T-1 prices for two states); XO *et al.* Oct. 3 *Ex Parte* Letter, Attach. at 3-4.

¹³² SBC/AT&T Aug. 1 *Ex Parte* Letter, App. A at 3. It is not clear how similar the bid process was between the several companies, whether there were substantial negotiations after the bids, or whether the bids were conducted in several rounds. Understanding these, and possibly other, considerations could be important in interpreting the data.

¹³³ See, e.g., XO *et al.* Oct. 3 *Ex Parte* Letter, Attach.; SAVVIS/XO July 29 *Ex Parte* Letter, Attach. at 5.

accept the commenters' bid data analyses as demonstrating that the merger will lead to special access price increases at particular buildings.

47. In summary, within SBC's region, we find that, collectively, other competing carriers have more fiber and many more collocations than does AT&T.¹³⁴ In the limited number of MSAs where AT&T has local facilities in the SBC region, AT&T represents less than [REDACTED] percent of the competitive collocations. Moreover, the record clearly shows that AT&T's collocations are located exclusively in MSAs with many other competitive collocations. Therefore, we conclude the elimination of AT&T as a provider of Type II wholesale special access services should not have an appreciable effect on the price or availability of Type II wholesale special access services.

48. *MSA-wide effects.* To the extent that the elimination of AT&T as a competitor in the Type I wholesale special access market causes competitive harm, this also could result in increases in the MSA-wide prices that SBC sets for its own special access services.¹³⁵ However, as discussed above, we find that the divestitures contained in the consent decree executed by the Department of Justice and the Applicants should adequately address any competitive concerns that we might have relating to this market. Thus, in light of the DOJ Consent Decree, we conclude that the merger is not likely to result in increases in the MSA-wide prices that SBC charges for special access services. Moreover, the voluntary commitments that the Applicants have offered,¹³⁶ and which we accept and make conditions of our approval of this order, provide us with further comfort that the merger is not likely to result in

¹³⁴ We reject EarthLink's assertion that the proposed merger will eliminate AT&T as a potential wholesale DSL competitor. EarthLink contends that AT&T "intended to move aggressively into the broadband space" and had the collocations, networking equipment, and other technology to do so. Letter from Jennifer L. Phurrough, Counsel for EarthLink, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-65, 05-75, Attach. at 25 (filed Sept. 26, 2005) (EarthLink White Paper). As an initial matter, we note that EarthLink relies on statements about AT&T's intentions regarding DSL from 1999-2001, *see id.* at 24-25 nn.56-59, many years prior to its determination to discontinue pursuing its consumer DSL line of business. *See infra* Part V.D (discussing AT&T's decision to discontinue offering mass market services). Consequently, EarthLink's outdated evidence does not persuade us that AT&T was likely to begin offering wholesale DSL services in the absence of the merger. Moreover, we conclude that AT&T is not uniquely positioned to become a wholesale DSL provider. The Commission previously has found that "competitors are actively deploying their own packet switches, including routers and DSLAMs to serve both the enterprise and mass markets, and that these facilities are much cheaper to deploy than circuit switches," suggesting that AT&T likely is not unique in its ownership of DSLAMs and networking equipment. *Triennial Review Order*, 18 FCC Rcd at 17321-22, para. 538. Further, as we find above, there are numerous other competitive LECs with collocations. Given that unbundled DS0 loops are available throughout SBC's region, those other carriers also can use their collocations in conjunction with unbundled loops to offer wholesale DSL service. Indeed, AT&T itself offers DSL "by leasing wholesale services from unaffiliated DSL providers" such as Covad, New Edge, and MegaPath. AT&T Info. Req. at 54.

¹³⁵ As previously discussed, each building represents a separate relevant geographic market, and competitors frequently charge different prices for special access services to different buildings. To the extent that SBC has received Phase II pricing flexibility, but nevertheless sets special access prices that are geographically averaged over an entire MSA, we would expect that SBC would set a geographically uniform price that maximizes its profits given competitive conditions that vary from building to building. If competition is reduced to a number of buildings, this is likely to cause SBC to raise its MSA-wide price. *See, e.g.,* Global Crossing Farrell Declaration at para. 17; *see also EchoStar/DirectTV Order*, 17 FCC Rcd at 20629, para. 185 (providing a formula that describes how the profit-maximizing, uniform price that is averaged over multiple geographic markets will rise in response to a decrease in competition in particular local markets).

¹³⁶ *See generally* SBC Oct. 31 *Ex Parte* Letter, Attach.; *see also* Appendix F.